CRI/S/001/2013

IN THE HIGH COURT OF LESOTHO

In the Matter Between:-

REX

Vs

TEBOHO LETEBA

SENTENCE

Coram : Hon. N. Majara J

Date of hearing : 28th May 2014

Date of sentence: 5th June 2014

Summary

Accused committed for sentence before the High Court after conviction in terms Sexual Offences Act 2003 – complainant a seven year old minor – whether court a quo had the jurisdiction to hear the matter – the Act prescribing committal where appropriate penalty beyond the penal power of the trial court thus empowering it to try the accused – accused sentenced to imprisonment for twenty years.

ANNOTATIONS

Statutes

1. Sexual Offences Act No. 3 of 2003
2. Criminal Procedure and Evidence Act No.9 of 1981

Cases

1. R v Tumelo Monesa CRI/S/4/10
2. R V JANKI CRI/S/10/05
3. R V Kopano Malunga CRI/S/X/2007-CRI/S/2009 (unreported)
4. DPP v Tebang Khama C of A (CRI) 8 OF 2008 (unreported)
5. R v Ranthithi & Another C of A (CRI) 12 OF 2007 (unreported)
6. S v Rubie 1975 (4) SA 855
7. R v Sondla 1992 (2) SA 613
8. S v C 1996 (2) SACR 181
9. R v Tsotleho Thulo CRI/S/04/2013

[1] The accused was charged with contravening **section 8 (1) of the Sexual Offences Act (the Act)** [1] read with Section 32 (vi) thereof before the Leribe Magistrate Court. He pleaded guilty to the charge and was convicted in the alternative namely for contravening section 9 (1) of the Act. The trial Court then committed him to this Court for sentence in terms of section 31 (2) of the Act which provides as follows:-

[1] Act No. of 2003

> *"Where the appropriate penalty is beyond the ceiling of penal powers of the trial court, it shall, after conviction, send the case to the High Court for sentence."*

[2] Not only did the accused plead guilty to the charge, but he also accepted the outline of the evidence by the prosecutor as being a true reflection of the facts. In brief, it was alleged that on or about the 19th May 2013, and at or near ha Khopa in the district of Leribe, the accused unlawfully and intentionally committed a sexual act with a minor child aged 7 years.

[3] The evidence revealed that this took place again at a later date and on both occasions, the accused allegedly called the child and told her that "*they should do bad things*" upon which he would undress her and insert his penis into her vagina and then sent her to play. The accused is also reportedly related to the minor child. It is after the second incident that the minor child reported the matter to one Mpho who in turn informed the child's mother.

[4] I have already shown that the court a quo convicted the accused for contravention of section 9 of the Act. The section provides that a person who persistently abuses a child sexually commits an offence.

[5] It is against this background that Counsel for the Defence made the submission that the court a quo did not have the jurisdictional powers to try the accused because at the time she was a Magistrate of second class.

[6] In support thereof he quoted the case of **Rex v Janki** [2] in which the High Court per Mahase J, held that a second class magistrate is not competent to preside in a matter in which the prescribed sentence is beyond eight years imprisonment.

[7] He added per his written submissions that there has been inordinate delay in sentencing the accused as he was convicted in May 2013 and the delay poses a great prejudice on him on the basis of which he should be discharged. To this end, Counsel referred this Court to the case of **R v Kopano Malunga** [3] in which the learned Lehohla J discharged the accused who had similarly been committed for sentencing and where there had been undue delay in the prosecution of his sentence.

[8] On the other hand Counsel for the Crown made the submission that the accused was properly convicted by the Court a quo in terms of the provisions of Section 9 of the Act. For purpose of the sentence itself, **Ms Tsutsubi** referred the Court to the provisions of section 32 (a) (v) of the Act which prescribes the minimum sentence for a first conviction under section 9 as fifteen years imprisonment.

[9] With respect to the aspects that have to be considered when passing sentence, Counsel for the Crown quoted the case of **The DPP v Tebang Khama** [4] as well as that of **Rex v Ranthithi & Ano** [5] where it

[2] CRI/S/10/2005
[3] CRI/S/X/2007-CRI/S/2009 (unreported)
[4] C of A (CRI) 8 OF 2008 (unreported)
[5] C of A (CRI) 12 OF 2007 (unreported)

was stated that the Court has to consider amongst others, the nature and seriousness of the offence, the circumstances of the offender and the interests of society.

[10] I now proceed to deal with the defence's submission that the court a quo did not have the jurisdictional powers to try the accused because she was a Magistrate of second class. In this connection, my simple answer is that the Act itself prescribes such a procedure in terms of section 31 (2). In addition, section **293 of the Criminal Procedure and Evidence Act** [6] carries a similar provision. This means that the magistrate was within her statutory powers to try the accused and to commit him for sentence. Thus, this submission falls aside.

[11] With respect to the issue of delay which was similarly raised in another case in which the accused was committed to this Court for sentence, [7] I find it convenient to quote my remarks therein in which I stated as follows:-

> *"While I do accept that by spending one (1) year and three (3) months in prison while awaiting his trial the accused did suffer prejudice, I am also of the opinion that in the light of the seriousness of the offence, the prescribed sentence and the fact that sexual offending is one of the worst scourges of abuse against the vulnerable section of society especially young children, the prejudice can be mitigated in the sense that the custodial sentence to be imposed should in the final*

[6] Act No. 9 of 1981
[7] R v Tumelo Monesa CRI/S/4/10

analysis be less the period of time he has already spent in prison.

As shown above, the penalty provision prescribes imprisonment for a period of not less than ten (10) years without the option of a fine. This means that the ten (10) years is only the minimum sentence to be imposed and the Court is at liberty to impose a much higher sentence when everything is considered. Thus, even if the accused had started serving his sentence immediately after his conviction he would still be far from the half way mark of the prescribed minimum so that it is my view that when all is said and done, the prejudice he may have suffered is far outweighed by all these other factors.

Indeed in the case of ***Malunga (supra)*** *which* ***Mr. Lephuthing*** *sought to rely on in this application the accused was discharged on the basis of Section 141(2) of the CP & E. However, there is a distinction to be drawn between the two in that in that case, not only had the accused spent two (2) years without his sentence being prosecuted, but the record was not traceable and the Crown itself instituted the application for his discharge. Therein the learned Lehohla CJ stated as follows in relevant parts at p5 of the record:-*

> *"The DPP's reaction to the above state of affairs concerning the importance of security of records was that, a committal is by its nature a continuation of a trial and that it goes without saying that, the fact of the Accused having spent two years in custody without being sentenced was no doubt against his constitutional right to a fair trial. He submitted further that* ***on account of***

> ***non traceability of the records, want of prosecution for Accused's sentence and the resultant prejudice to the constitutional right of the Accused, he prays that the matter be permanently stayed."*** (my emphasis)

[12] Therefore, for the same reasons as quoted above, it is my view that the prejudice that the accused might have suffered or stands to as a result of the delay in the prosecution of his sentence is far outweighed by the other factors of this case which include but are not limited to, the seriousness of the offence, the age of the minor child, the interests of society, and the fact that the prescribed sentence far exceeds the time he has already spend in prison before sentence. At any rate, the sentence he will get can be computed in such a manner that the said period is taken away from the period he is yet to serve. Thus, this ground also falls off.

[13] Coming to the issue of the sentence itself, it is salutary to refer to the remarks of the Court in the case of **S v Rubie** [8] which properly reflect what is now established law. Therein, the Court stated thus:-

> *"Punishment should fit the criminal as well as the crime, be fair to society and be blended with a measure of mercy according to particular circumstances."*

[8] 1975 (4) SA 855 at 862

[14] In addition, it is also crucial for the Court to mete out a sentence that is not only exemplary to others but that also serve as a deterrent to others from committing the same or similar offences.[9]

[15] Thus when quoting with approval the remarks of the Court in **S v C** [10] my sister Hlajoane J correctly stated as follows in the case of **R v Tsotleho Thulo** and I entirely align myself with these sentiments [11] :-

> *"A rapist does not only murder a victim, he destroys her self-respect and destroys her feeling of physical and mental integrity and security. His monstrous deed often haunts his victim and subjects her to mental torment for the rest of her life, a fate far worse than loss of life."*

[16] *In casu*, it has been established that the victim is very young, merely seven (7) years old yet the accused saw nothing wrong with defiling her not only once but on two separate occasions. In this regard, I find it convenient to reiterate the comments that I made in the case of **Monesa (supra)** *to wit*:-

> *"The traumatic effects of victims of sexual abuse, especially young ones are legion. The ever-present risk of STIs on innocent victims, HIV/AIDS being the most serious one in this era is a matter of serious concern. Further, the culture of disrespect of the fairer sex and young children and the tendency by some men to violate them with impunity without so much as a thought towards their basic rights and dignity*

[9] S v Sondla 1992 (2) SA 613
[10] 1996 (2) SACR 181 at 186
[11] CRI/S/04/2013

has to be discouraged at all costs. Needless to mention, oftentimes, victims of sexual abuse carry the burden of stigmatization from society as opposed to the perpetrators. Such is the bizarre and ironic nature of sexual violence; double victimization."

[17] It is also quite disturbing that the accused herein is a relative of the very young child. As it has repeatedly been stated in previous similar cases, the child looked up to him as a protector rather than the villain. It is indeed a sad fact that instead of diminishing, this phenomenon is gaining momentum and has become so wide spread that it now forms part of the daily news reports not only in Lesotho but in other countries as well. It is a grave cause for serious concern and certainly needs to be discouraged at all costs. One way is by the Courts marking their displeasure by imposing serious punishments that properly reflect the gravity thereof.

[18] It is therefore in consideration of all the foregoing reasons that I find that the appropriate sentence that will meet the justice of this case is for the accused to be send to prison for a period not less than twenty (20) years. I therefore order as follows:-

The accused is sentenced to imprisonment for a period of twenty (20) years.

N. MAJARA
JUDGE

For the Crown : Ms Tsutsubi

For the Defence : Mr. Makara